MUI Plaza Sdn Bhd v Hong Leong Bank Bhd & Ors (No 2)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–22–187 OF 1996
KAMALANATHAN RATNAM J
25 NOVEMBER 1998

Contract *— Misrepresentation — Whether representation was in nature of a promise — Whether capable of having the character of being true or false at the time it was made*

Contract *— Misrepresentation — Whether representation made on behalf of another party*

The plaintiff landlord claimed against: (i) the first defendant tenant for breach of a tenancy agreement; (ii) the second defendant for deceit and misrepresentation; and (iii) the second and third defendants for inducing the first defendant to breach the tenancy. The second and third defendants applied to strike out the amended writ and statement of claim. The plaintiff pleaded that the second defendant had represented to the plaintiff that the first defendant would be responsible to the plaintiff for any loss or damage. The applicants submitted that: (i) since the representation was in the nature of a promise, it was not capable of having the character of being true or false at the time it was made; and (ii) the second defendant made the representation on behalf of the first defendant, therefore, only the first defendant can be liable for the representation of the second defendant.

Held, dismissing the application with costs:

(1) It was claimed that the second defendant had no actual intention of fulfilling his representation at the time it was given or was reckless to that fact. Such a statement was capable of being either true or false at the time he made it because it related to the second defendant's present state of mind and his particular intention at the time he made it (see p 125C–D); *R v Sunair Holidays Ltd* [1973] 1 WLR 1105 distinguished. Further, the plaintiff relied on the second defendant's representation by allowing the first defendant to remain in occupation. Accordingly, the cause of action was available to the plaintiff as has been pleaded (see p 125F, G–H); *Derry v Peek* (1889) 14 AC 337 followed. In any case, since the first defendant now claimed that the tenancy agreements were void, the plaintiff was entitled to contend that the representation gave rise to a cause of action independent of the original cause of action for breach of contract (see p 125H–I).

(2) The issue whether the second defendant was acting on behalf of first defendant was a matter of evidence to be adduced at trial where the second defendant must be made a party to answer to the respective allegations levelled against him. Also, it was well within the plaintiff's right to contend that the second and third defendants contrived to induce the first defendant to breach its tenancy in order to mutually benefit themselves (see p 126C–E).

A **[Bahasa Malaysia summary**

Plaintif iaitu tuan punya tanah telah menuntut terhadap: (i) defendan pertama iaitu penyewa untuk kemungkiran perjanjian penyewaan; (ii) defendan kedua atas penipuan dan salah nyata; dan (iii) defendan-defendan kedua dan ketiga kerana mendorong defendan pertama melanggar penyewaan tersebut. Defendan-defendan kedua dan ketiga memohon untuk membatalkan writ dan pernyataan tuntutan terpinda. Plaintif memplidkan bahawa defendan kedua telah membuat representasi kepada plaintif bahawa defendan pertama akan bertanggungjawab kepada plaintif terhadap apa-apa kerugian atau kerosakan. Pemohon-pemohon berhujah bahawa: (i) oleh kerana representasi tersebut adalah bersifat perjanjian, ia tidak mungkin bersifat benar atau palsu semasa ia dibuat; dan (ii) defendan kedua membuat representasi bagi pihak defendan pertama, maka hanya defendan pertama bertanggungjawab atas representasi defendan kedua.

Diputuskan, menolak permohonan dengan kos:

(1) Adalah dituntut bahawa defendan kedua tidak mempunyai tujuan sebenar untuk memenuhi representasinya semasa ia diberikan atau telah bersikap melulu terhadap hakikat tersebut. Pernyataan sedemikian mungkin benar atau palsu semasa ia membuatnya kerana ia berkaitan dengan keadaan fikiran defendan kedua sekarang dan tujuannya yang tertentu semasa ia membuatnya (lihat ms 125C-D); *R v Sunair Holidays Ltd* [1973] 1 WLR 1105 dibeza. Seterusnya, plaintif bergantung kepada representasi defendan kedua dengan membenarkan defendan pertama mengekalkan penghunian. Oleh itu, kausa tindakan tersedia kepada plaintif seperti yang telah diplidkan (lihat ms 125F, G–H); *Derry v Peek* (1889) 14 AC 337 diikut. Walau bagaimanapun, oleh kerana defendan pertama kini menuntut bahawa perjanjian-perjanjian penyewaan tersebut adalah tak sah, plaintif berhak berhujah bahawa representasi menimbulkan kausa tindakan adalah bebas daripada kausa tindakan yang asal untuk kemungkiran kontrak (lihat ms 125H–I).

(2) Isu mengenai sama ada defendan kedua bertindak bagi pihak defendan pertama merupakan suatu hal berkaitan keterangan untuk dikemukakan di perbicaraan di mana defendan kedua mestilah dijadikan satu pihak untuk menjawab pengataan-pengataan masing-masing yang dibentangkan terhadapnya. Juga, ia adalah dalam rangkuman hak plaintif untuk berhujah bahawa defendan-defendan kedua dan ketiga mengikhtiarkan defendan pertama supaya melanggar penyewaannya untuk manfaat mereka sendiri (lihat ms 125C–E).]

Notes

For cases on misrepresentation, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1881–1901.

Cases referred to

Derry v Peek (1889) 14 AC 337 (folld)
HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd [1957] 1 QB 159 (refd)
MUI Plaza Sdn Bhd v Hong Leong Bank Bhd [1998] 6 MLJ 203 (refd)
R v Sunair Holidays Ltd [1973] 1 WLR 1105 (distd)

Legislation referred to

Companies Act 1965 s 132E
Rules of the High Court 1980 O 18 r 19(1)

N Navaratnam (*Wong Sow Wei* with him) (*M Navaratnam & Co*) for the plaintiff.
Robert Lazar (*Liew Li-Hian* with him) (*Shearn Delamore & Co*) for the second and third defendants.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

This is a claim by the plaintiff landlord against the first defendant tenant for breach of a tenancy agreement. It is also a claim against the second defendant for deceit and misrepresentation and against the second and third defendants for inducing the first defendant to breach the tenancy.

The facts of this case have been set out by me in an earlier related decision (see *MUI Plaza Sdn Bhd v Hong Leong Bank Bhd* [1998] 6 MLJ 203).

The application

This is the second and third defendants' application (encl 51) pursuant to O 18 r 19(1) of the Rules of the High Court 1980 to strike out the amended writ (encl 46) and the amended statement of claim (encl 49) on the ground that there is no reasonable cause of action against the said second and third defendants.

Court's findings

For the purposes of this application only, both parties agreed to proceed on the basis that the facts as pleaded by the plaintiff in the amended statement of claim are true and correct. The defendants raised various issues.

Misrepresentation against the second defendant

In para 9 of encl 49, the plaintiff pleaded that the second defendant had represented to the plaintiff on behalf of himself or of the defendant that the

first defendant would be responsible to the plaintiff for any loss or damage. The applicants' submission herein was that since the representation was in the nature of a promise, it was not capable of having the character of being true or false at the time the representation was made. The defendants relied on *R v Sunair Holidays Ltd* [1973] 1 WLR 1105 at p 1109 to premise such a submission. This was a case where a family made bookings at a hotel based on representations contained in a brochure distributed by the defendants. Some of the representations made as to the facilities available at the hotel were false. The defendants were charged under the Trade Descriptions Act 1968 ('TDA') for making false statements. They were convicted but succeeded on appeal as the court held that the TDA had no application to statements which amounted to promises as regards the future. The court held that the statements at the time they were made, could not have been said to be true or false because they related to the state of facilities offered at the hotel for the future. However, from the amended statement of claim, I find that the plaintiff claims that the second defendant had no actual intention of fulfilling his representation at the time it was given or was reckless to that fact. To my mind, such a statement is capable of being either true or false at the time he made it because it relates to the second defendant's present state of mind and his particular intention at the time he made it. Besides, *Sunair*'s case was decided in relation to the Trade Description Act, whereas the plaintiff herein is relying on an actionable misrepresentation and upon the tort of deceit.

In any event, a promise by itself can amount to an actionable misrepresentation if it is intended to be relied on and is in fact relied on to the detriment of the person who relies upon it and since in this case the plaintiff is contending that the representations when made were false, the plaintiff has a cause of action to recover damages for fraudulent misrepresentation and for the tort of deceit (see *Derry v Peek* (1889) 14 AC 337). The statement of claim shows that the plaintiff relied on the second defendant's representation by allowing the first defendant to remain in occupation and thus suffered a detriment by loss of possible bargaining power with prospective new tenants. It is not beyond circumspection to conclude that prospective tenants would want a definite date by when occupation can commence and if a landlord is unable to give such specific details, he will no doubt be unable to satisfy the basic requirement of a prospective tenant. If therefore damages arise as a result of such loss of possible bargaining power with prospective tenants, the extent of such loss or damage is surely a matter of evidence at trial to be established through such prospective tenants, or estate agents or property valuers. Accordingly, it is my judgment that since the amended statement of claim discloses that the actionable misrepresentation was made by the second defendant or by the first defendant, the said cause of action is available to the plaintiff as has been pleaded.

In any case, since the first defendant now claims that the said tenancy agreements were void by reason of a breach of s 132E of the Companies Act 1965 (see my earlier decision on this), the plaintiff is entitled to contend in law that the representation by the second defendant whether on his own behalf or that of the first defendant gives rise to a cause of action

independent of the original cause of action for breach of contract. Therefore, the plaintiff is clearly entitled to recover under the alternative causes of action as pleaded.

Second defendant acting on behalf of first defendant

The applicants contend that if the second defendant made the representation on behalf of the first defendant, then only the first defendant can be liable for the representation of the second defendant as the second defendant was at all material times the Executive Chairman of the first defendant. Following the decision in *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 at p 160, the applicants contended that the state of mind of the second defendant who represented the directing mind and will of the first defendant and controlled what it did, is the state of mind of the first defendant.

To my mind, this argument at this stage of the proceedings presupposes that the second defendant did act for the first defendant when he spoke. I hold that this is a matter of evidence to be adduced at trial.

Since the plaintiff has pleaded that the second defendant is the controlling mind of both the first and third defendants, it is imperative that the second defendant be made a party to answer to the respective allegations levelled against him when acting as the controlling mind of each of the first and third defendants.

It is well within the plaintiff's right to contend that the second and third defendants contrived to induce the first defendant to breach its tenancy in order to mutually benefit themselves. The statement of claim suggests that the second defendant made such representation as to induce the plaintiff to allow the first defendant time to move into new premises at Wisma Hong Leong owned by the third defendant.

Having considered these issues, I find it unnecessary to consider the rest of the issues. The second and third defendants' application is dismissed with costs.

Application dismissed with costs.

Reported by Loo Lai Mee